93-640

Supreme Court, U.S.
FILED
OCT 25 1993

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

KARL GLENN STUMPF,

Petitioner,

-vs-

STATE OF MICHIGAN

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

WHETHER A SEARCH WARRANT AFFIDAVIT BASED ON UNCORROBORATED HEARSAY INFORMATION FROM AN UNNAMED SOURCE THAT WITHIN THE PAST SIXTEEN MONTHS, PETITIONER RECEIVED SHIPMENTS OF MARIJUANA SEEDS AND/OR GROWING EQUIPMENT, IS SUFFICIENT TO ESTABLISH PROBABLE CAUSE TO SEARCH PETITIONER'S HOME, UNDER THIS COURT'S DECISION IN ILLINOIS V. GATES

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STATE OF MICHIGAN

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PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

Petitioner KARL GLENN STUMPF, through his attorney, R. STEVEN WHALEN, respectfully asks that this Court issue a Writ of Certiorari to review the judgment of the Supreme Court of the State of Michigan.

OPINIONS BELOW

The full text of the order of the Michigan Supreme Court, denying leave to appeal by a 4-3 vote, is reproduced in the Appendix, page 1a .

The opinion of the Michigan Court of Appeals is reported as People of the State of Michigan v. Karl Glenn Stumpf, 196 Mich.App. 218 (1992), and is reproduced in the Appendix, page 2a.

The full text of the order of the Michigan Supreme Court denying reconsideration is reproduced in the Appendix, page 16a.

STATEMENT OF JURISDICTION

The judgment of the Michigan Supreme Court, denying leave to appeal, was entered on June 2, 1993.

Petitioner's timely motion for reconsideration was denied by order entered on July 30, 1993.

This Court's jurisdiction is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Manner in which federal question was raised in the state courts

Petitioner was charged in the Macomb County, Michigan Circuit Court with the felony offense of manufacturing marijuana, contrary to M.C.L. 333.7401(2)(c); M.S.A. 14.15(7401)(2)(c). By way of a motion to suppress evidence in the trial court, Petitioner challenged, on Fourth Amendment grounds, the execution of a search warrant at his home in Roseville, Michigan. Following an evidentiary hearing, the trial court denied Petitioner's motion to suppress evidence. Petitioner then

entered a conditional plea of guilty to the charge, reserving the right to take a direct appeal by right to the Michigan Court of Appeals on the search warrant issue.

Following sentencing, Petitioner took a timely appeal by right to the Michigan Court of Appeals, raising the issue of whether the search warrant was issued in violation of the Fourth Amendment.[1] The Court of Appeals affirmed the trial court's order denying the motion to suppress.

Petitioner then filed an application for leave to appeal to the Michigan Supreme Court, again arguing the Fourth Amendment issue raised in this Petition. The Michigan Supreme Court denied leave to appeal by order, with three Justices dissenting.[2] Subsequently, the Michigan

[1] In the Michigan courts, Petitioner also challenged the search warrant on state constitutional and statutory grounds which are not relevant to this Petition.

[2] There are seven Justices on the Michigan Supreme Court; a grant of leave to appeal requires the votes of four Justices.

Supreme Court denied Petitioner's timely motion for reconsideration.

Facts

The physical evidence in this case, including marijuana plants and equipment allegedly used for growing marijuana, was seized from Petitioner's residence at 18990 Victor in the City of Roseville, Michigan on or about September 13, 1990, pursuant to a search warrant issued that same day. Michigan State Police Sgt. Curtis R. Schram swore out an affidavit for this search warrant. The affidavit for the warrant was entered into evidence at the suppression hearing.[3]

In the search warrant affidavit, Sgt. Schram relied on information from an unnamed informant referred to as "Hemp Tip number C-01-90". According to Sgt. Schram, the information originated with an unnamed individual who was arrested in Oregon by the federal Drug Enforcement

[3] The affidavit in support of the search warrant is sent forth in its entirety in the Appendix, page 17a.

Administration, who in turn relayed the information to the State Police post in Livonia, Michigan, who in turn relayed it to Sgt. Schram, who was assigned to the New Baltimore, Michigan post. Sgt. Schram never talked to the unnamed source, and did not even know who that person was. Nor did Sgt. Schram ever talk to anyone from the D.E.A. concerning this information.

The information from the unnamed informant was as follows:

> "On 6-28-90, Hemp Tip Number c-01-90 was received stating that a Karl Stumpf had received eight shipments of marijuana seeds and/or equipment used for growing marijuana within the past sixteen months at 18990 Victor, Roseville, Michigan."

Sgt. Schram testified that he had no personal knowledge of whether the alleged shipments to Petitioner consisted of seeds and growing equipment, or just growing lights.

Sgt. Schram's affidavit also stated that a check of utility records at Petitioner's residence showed increased

electrical usage during the months of July and August of the previous year, and that an upstairs window, as well as basement windows, were covered. The upstairs window had a fan.

Paragraphs 8, 9 and 10 of the affidavit indicated that three unrelated search warrants of other houses had been obtained using similar information, and that these other searches resulted in the seizure of "marijuana and items associated with the growing of marijuana." Although the affidavit did not refer to searches where no such items were found, Sgt. Schram conceded that in September of 1990, he obtained a warrant to search 17720 Ivanhoe in Roseville, Michigan, based on the same information from the same confidential informant, and absolutely no marijuana or related growing equipment was found. At the conclusion of the suppression hearing, the trial judge denied the Petitioner's motion to suppress, although he noted that "I think that it would have been much better if

the State Police had went out to Oregon to visit the deal out there and talked to him personally and came back and be able to talk personally of his own personal knowledge, it certainly would be the right way to do the case..."

REASONS FOR ALLOWANCE OF THE WRIT

The warrant issued for the search of Petitioner's home was based largely on information allegedly supplied by an unidentified informant. That information, as set forth in the affidavit of a Michigan State Police Detective, was that within the past 16 months, Petitioner had received eight shipments of "marijuana seeds and/or equipment used for growing marijuana." (Emphasis added). There was no allegation in the affidavit that the unidentified informant was the person who sent shipments of growing lights and/or seed to Petitioner.

In Illinois v. Gates[4], this Court adopted a totality of the circumstances test in assessing whether or not a search warrant affidavit based on hearsay information from a confidential source establishes probable cause. This Court stated:

[4] 462 U.S. 213 (1983).

> "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for...conclud[ing]' that probable cause existed."

Thus, although the Court in Gates abandoned the more strict two-pronged test of Aguilar v. Texas[5] and Spinelli v. United States[6], it nevertheless noted the continuing importance of showing an unnamed informant's credibility and the basis of his knowledge in determining whether probable cause exists.

In Petitioner's case, there are glaring problems with the hearsay portion of the affidavit. The first is the use of the ambiguous term "and/or". In determining whether there is probable cause to believe that Petitioner had marijuana

[5] 378 U.S. 108 (1964).

[6] 393 U.S. 410 (1969).

at his house, it would make a significant difference if he received plant growing lights and marijuana seeds, as opposed to receiving only plant growing equipment, which has perfectly legitimate and common uses.

The use of the phrase "seeds and/or equipment" cannot reasonably be construed to mean "seeds and equipment" or "seeds alone."[7] To condone the use of such imprecise information would be to render meaningless the "substantial basis" requirement of Gates.[8]

[7] The Michigan Court of Appeals erroneously stated that "[t]he informant told law enforcement officials that eight shipments of both marijuana seeds and equipment used for growing marijuana were sent to defendant at his residence..." There is absolutely no support for this statement in the record. The search warrant affidavit, which is also set forth in the Court of Appeals opinion, clearly uses the term "and/or."

[8] The "confidential informant" in this case may not have been a person, but rather a customer list of a company that ships plant growing lights to legitimate customers and marijuana growers alike. Both the search warrant affidavit and the testimonial record are clear that a number of other warrants were sought using identical language, with only the names and addresses of persons and places to be searched changed. If such was the case, then the Michigan courts, by sanctioning the use of the

The hearsay information in the affidavit in fact tends to show that the unnamed informant did not have personal knowledge of the facts. If the informant had personal knowledge that Petitioner received marijuana seeds, presumably he or she would have said so, rather than relying on the speculative and meaningless phrase "and/or." The dates contained in the affidavit--"within the past 16 months"-- are similarly vague, and suggest a lack of personal knowledge.

The hearsay information in the affidavit is also too stale to support a finding of probable cause, in that it supposedly recounts events that occurred "within the past 16 months." Probable cause or information which is stale--that is, which existed remote in time from the issuance of

phrase "and/or," allowed innocent purchasers of lights to be lumped together with purchasers of seeds, if indeed there were any such customers. It is axiomatic that probable cause must be individualized.

the warrant--may render a warrant invalid. In Sgro v. United States[9], this Court stated:

> "...[I]t is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time...The new warrant must rest upon a proper finding and statement by the commissioner that probable cause then exists. That determination, as of that time, cannot be left to mere inference or conjecture."

Nor can the staleness of the information contained in the affidavit be remedied by the use of the ambiguous term "within the past 16 months." This phrase does not mean "starting 16 months ago and ending yesterday," for if the police had information concerning a very recent transaction, they surely would have put that in the affidavit. Rather, the phrase appears to be a subterfuge to give stale information the appearance of newness. To carry this ploy to its reductio ad absurdum, if a defendant sold drugs to an informer 10 times, the first sale being 5 years ago and the last sale being 4 years and 11 months ago, the affidavit

[9] 287 US 206 (1932).

the past 5 years. Such a statement, while being true in a literal sense, does not alter the fact that the information is far too stale to support a finding of probable cause.

Even given that marijuana is grown over a period of time, information that is as much as 16 months old is insufficient to establish probable cause.[10]

It is clear then, that the hearsay information in the affidavit is insufficient, standing alone, to support a finding of probable cause. Nor was there any significant independent corroboration of the theory that Petitioner maintained an ongoing marijuana-growing operation in his house. To the contrary, additional police investigation might state that the defendant sold drugs 10 times within

[10] The Michigan Court of Appeals, attempting to downplay the fact that at least one other search based on identical information failed to turn up any evidence of wrongdoing, noted, "It is not unusual that illegal activity is terminated, temporarily discontinued or moved during the interim period while police attempt to confirm information and seek a warrant." This statement rather pointedly conflicts with the Court's other observation that "[b]ecause it requires time for plants to germinate and grow, the evidence was not likely to have dissipated despite the passage of time."

showed only the existence of a number of facts which were completely consistent with innocent conduct. The additional paragraphs of the affidavit, on which the police relied, are as follows:

Paragraph (3): This refers to the increased electrical usage during the months of July and August of 1989. As Sgt. Schram acknowledged at preliminary examination, the months of July and August are generally the hottest months of the year in Michigan. Most household would show an increase in electrical usage due to the use of air conditioning. Again, this information is consistent with innocent activity.[11]

[11] At the suppression hearing, the court and the prosecutor apparently agreed that the fact of increased electrical usage in the summer months had little probative value:

> "THE COURT: What about the electrical claim that there is more usage?
>
> MRS. MURRAY (ASSISTANT PROSECUTOR): I think that there would be more in those months.

In addition, even if the electrical usage had some probative value, the period of increased usage referred to in the affidavit involved a period of time more than a year before the issuance of the warrant, and was therefore stale.

Paragraph (5): This states that two days before the warrant was issued, the affiant observed a 1962 Chevrolet in Petitioner's driveway, which was registered to the Petitioner. So what?

Paragraph (6): This states that "a check of Karl Stumpf's arrest record shows that he has been arrested for drugs in the past." Again, the appropriate response is, "So what?" The Petitioner has never been convicted of any drug charge, and even if he had, there is no principle of law which suspends the Fourth Amendment in cases where the suspect has an arrest or conviction record.

> THE COURT: It's obviously more in August and July.
>
> MRS. MURRAY: I agree with your Honor."

Paragraph (7): This alleges that at some unspecified time in the past, the affiant observed that an upstairs window in Petitioner's residence was covered up and had a fan, and that the basement windows were covered. Again, the use of a fan and window coverings is not particularly unusual, and is consistent with innocent conduct.

In some cases, facts which are consistent with innocent conduct can create a suspicion which might justify an investigatory stop of the type described in Terry v. Ohio[12], but such innocent information cannot be aggregated to satisfy the more demanding requirements of probable cause. The use of this type of information in the present case is analogous to airport searches made under the so-called drug courier profile. The drug courier profile is an informal and fluid list of factors which purports to identify persons who carry drugs between certain cities on commercial airlines. Factors include paying for a ticket in

[12] 392 U.S. 1 (1968).

cash, use of an alias, using little luggage, travelling from or to certain so-called "source cities," such as Miami and San Diego, and appearing nervous upon leaving the plane. See United States v. Mendenhall[13].

In a number of drug courier profile cases, this Court has upheld investigative Terry-stops of suspects, but has consistently rejected the proposition that the profile factors alone amount to probable cause. For example, in Florida v. Royer[14], the facts were that a nervus young man with two bags paid cash for an airline ticket to a "target city," and that he bought the ticket under an assumed name. This Court explicitly held that these facts did not amount to probable cause. See also, Reid v. Georgia[15] (aggregation of innocent factors under the profile did not even amount to reasonable suspicion under Terry).

[13] 446 U.S. 544 (1980).

[14] 460 U.S. 491 (1983).

[15] 448 U.S. 438 (1980).

In the present case, the police seemed to be relying on a de facto "marijuana grower profile," which is even more far-reaching than the drug courier profile, in that the police here suggest that the aggregation of a small number of innocent factors actually provides probable cause to issue a search warrant of a private residence. The Michigan courts erroneously validated that theory, which flies in the face of the Fourth Amendment.

Paragraphs (8), (9) and (10): These allege that on three separate dates in August of 1990, in three unrelated cases, "Affiant obtained a search warrant using the same information from the informant, and it resulted in a seizure of marijuana and items associated with the growing of marijuana." Apparently, the affiant offered this information to bolster the credibility of his anonymous source, or to support the reliability of the information. However, this allegation is of no statistical value absent information as to how many times similar information failed to lead to the discovery of marijuana growing operations. At preliminary

examination and at the suppression hearing, Sgt. Schram admitted on that on the very day that Defendant's house was searched, he obtained another search warrant for a different house in Roseville, based on the same type of information, which failed to turn up any evidence of marijuana or growing equipment.

Taken individually or in combination, the allegations contained in the search warrant affidavit in these case are completely consistent with innocent conduct, and do not support the magistrate's finding of probable cause.

The search warrant issued in this case facilitated a police fishing expedition, and, viewed under the totality of the circumstances, was not based on sufficient articulable facts which would fairly support a finding of probable cause. In upholding the warrant, the Michigan Court of Appeals and Supreme Court are in conflict with this Court's ruling in Illinois v. Gates, supra. If allowed to stand, the requirements of Gates will be rendered meaningless in the State of Michigan. Petitioner

respectfully asks that this Court review this conflict, and reverse the judgment of the Michigan courts.

CONCLUSION

WHEREFORE, Petitioner KARL GLENN STUMPF asks that this Honorable Court grant a writ of certiorari and reverse the judgment of the Michigan courts.

Respectfully submitted,

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Dated: October 19, 1993

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Michigan Supreme Court
Lansing, Michigan

Order

Entered:
June 2, 1993

Michael F. Cavanaugh
Chief Justice
Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallet, Jr.
Associate Justices

95151

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

SC: 95151
COA: 144151
LC: 90-1934-FH

KARL GLENN STUMPF,
Defendant-Appellant.

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Cavanaugh, C.J., Levin and Brickley, JJ., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

_____, 1993

/s/
Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

October 5, 1993
9:10 a.m.

v

No. 144151

KARL GLENN STUMPF,

Defendant-Appellant.

Before: Hood, P.J. and Connor and Taylor, JJ.

CONNOR, J.

Defendant conditionally pled guilty to the manufacture of marijuana, MCL 333. 7401(2)(c); MSA 14.15(7401(2)(c), and was fined $1,000. Defendant appeals as of right, and we affirm.

Defendant's guilty plea was conditioned upon this Court's review of the trial court's decision on a motion to suppress evidence obtained pursuant to a search warrant. Defendant argued below and now argues on appeal, that the

affidavit offered in support of the warrant to search defendant's residence was based on stale, false and incomplete information; did not support a finding of probable cause to search; and the personal knowledge of an unnamed informant was not established.

This Court's analysis on appeal will be guided by the principles recently enunciated in People v Russo, 439 Mich 584, 603-604; ___NW2d___ (1992), wherein our Supreme court clarified that reviewing courts should read the search warrant and the affidavit in a commonsense and realistic manner. Deference is afforded the magistrate's decision base upon a preference for searches conducted pursuant to warrants, and a reviewing court must only insure that there is a substantial basis for the magistrate's conclusion that there is a fair probability that contraband or evidence of a crime will be found in a particular place. Russo, supra, p. 604.[1]

The affidavit of Detective Sergeant Curtis Schram included the following pertinent facts to support probable cause:

> 2) On 6/28/90 Hemp Tip number C-01-90 was received stating that a Karl Stumpf had received eight (8) shipments of marijuana seeds and/or equipment used for growing marijuana within the past 16 months at 18990 Victor...
>
> 3) A check with the utility company of 18990 victor, shows that a Vivian Stumpf is living at that address. Further, that from 6/9/89 to 7/12/89, 1210 KWH hours of electricity was used. The following month, the rate increased to 1537 KWH hours, and the following month, increased to 1600 KWH hours.

4) Affiant contacted the residence at 18990 Victor by telephone and a Karl Stumpf identified himself as being at the residence.

5) Affiant, on 9/11/90, observed a 1962 Chevrolet, 2 door, 90/MI, 776-YHN, parked in the driveway. LEIN showed the vehicle was registered to Karl Stumpf.

6) A check of Karl Stumpf's arrest record shows that he has been arrested for drugs in the past.

7) A check at 18990 Victor ... was made by Affiant. It was observed that an upstairs window was covered up and had a fan. Further, the basement windows were also covered.

8) On 8/8/90, Affiant obtained a search warrant using the same information from the informant, and it resulted in a seizure of

marijuana and items associated with the growing of marijuana.

9) On 8/21/90, Affiant obtained a search warrant using the same information from the informant, and it resulted in a seizure of marijuana and items associated with the growing of marijuana.

10) On 8/27/90, Affiant obtained a search warrant using the same information from the informant, and it resulted in a seizure of marijuana and items associated with the growing of marijuana.

11) It is the belief of the Affiant, based upon ten years police experience and training, that Karl Stumpf is growing marijuana at 18990 Victor...

The trial court conducted an evidentiary hearing on the motion to suppress on March 25, 1991. The only witness at that hearing was Sergeant Schram.

Schram explained that the tip about the marijuana seeds and equipment was received from the Oregon State Police. They in turn received the information through the Drug Enforcement Administration. An individual arrested in Oregon by the DEA was cooperating with the DEA and providing information on the shipment of marijuana seeds and equipment used to grow marijuana. Schram did not personally speak with the informant, nor did he know who the informant was, but Schram received the information through the Michigan State Police.

Schram recounted that in about eight out of nine searches conducted pursuant to the information provided by this same informant, the police found marijuana. At the time this warrant was obtained, three out of four searches conducted were successful in finding marijuana or marijuana growing equipment. The equipment and seeds came from a company operating a mail order business, shipment equipment and seeds to customers.

The warrant and affidavit were both prepared on September 13, 1990. On that same day, defendant's residence was searched. As a result of that search, the police confiscated approximately fifteen small marijuana plants and eight large ones.

The trial court denied defendant's motion to suppress the evidence obtained pursuant to the warrant.

Personal Knowledge of the Informant

MCL 780.653; MSA 28.1259(3), as amended by 1988 PA 80, effective June 1, 1988, provides in pertinent part as follows:

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:

(b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

In general, the requirement that the informant have personal knowledge seeks to eliminate the use of rumors or reputations to form the basis of the circumstances requiring a search. See People v Brooks, 101 Mich App 416, 419-420; 300 NW2d 582 (1980), lv den 410 Mich 940 (1981). The personal knowledge element should be derived from the information provided, or material facts, not merely a recitation of the informant having personal knowledge. See People v Rosborough, 387 Mich 183, 198-199; 195 NW2d 255 (1972). If personal knowledge can be inferred from the stated facts, that is sufficient to find that the informant spoke with personal knowledge. People v Queenan, 158 Mich App 38, 53; 404 NW2d 693 (1987), lv den 429 Mich

869 (1987), cert den 484 US 1076; 108 S Ct 1052; 98 L Ed 2d 1014 (1988).

We believe the specificity of the details provided by the informant in this case, regarding the shipments, dates, defendant's name and address, were substantial indicia to support a finding that the informant spoke from personal knowledge. In addition, the affiant conducted an independent investigation which produced corroborating evidence and substantially verified the information supplies by the informant. See People v Harris, 191 Mich App 422, 426; 479 NW2d 6 (1991). Finally, the fact the police had previously utilized information provided by this informant in other warrant requests with successful results provided further support for the magistrate to conclude that the informant was credible and reliable. See People v Lucas, 188 Mich App 554, 569-570; 470 NW2d 460 (1991), lv den 439 Mich 885 (1991).

After reviewing the affidavit in a commonsense and realistic manner, we believe there was a substantial basis

for the magistrate to conclude the informant spoke with personal knowledge and was and was both credible and reliable.

False Information

Defendant also argues that some of the information provided in the affidavit was false. In support, defendant relies on Schram's admission at the evidentiary hearing that on the same day defendant's home was searched, another house was also searched, based upon an almost identical affidavit, and that search filed to turn up any drugs or drug-producing equipment. Because the affidavit in the instant case did not contain any reference to the unsuccessful search defendant argues that affidavit contained false or misleading information.

Franks v Delaware, 438 US 154, 155-156; 98 S Ct 2674; 57 l Ed 2d 667 (1978) requires that if false statements are made in an affidavit in support of a search warrant, evidence obtained pursuant to the warrant must be suppressed if the false information was necessary to a

finding of probable cause. In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured with claimed false information, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause. Franks, 438 US at 171-172; People v Williams, 134 Mich App 639, 643; 351 NW2d 878 (1984), lv den 421 Mich 860 (1985). The rule from Franks has been extended to material omissions from affidavits. People v Kort, 162 Mich App 680, 685-686; 413 NW2d 83 (1987), lv den 430 Mich 860 (1988).

After a review of the entire evidentiary hearing transcript, we do not agree with defendant that the lace of specific reference to the unsuccessful search was a material omission. The mere facta that information provided by the informant did not produce evidence of the suspected criminal activity in one isolated instance did not alone

uggest this informant was not reliable or credible. It is not unusual that illegal activity is terminated, temporarily discontinued or moved during the interim period while police attempt to confirm information and seek a warrant. We also note that the three other searches from information supplied by this informant were successful.

Moreover, there was no evidence that Schram intentionally or recklessly omitted information. Indeed, since these two searches were conducted on the same day, it is plausible that the other search had not been concluded at the time Schram prepared the affidavit or that Schram had not been apprised of the results.

Defendant also argued that the statement that defendant received "marijuana seeds and/or equipment" was false. Defendant contends that the police had not basis to believe defendant received marijuana seeds.

Schram believed that the majority of the information supplied by the informant emanated from customer lists of a company that sold marijuana producing equipment to

customers by mail. However, that fact did not preclude that the additional information provided by the informant regarding defendant's receipt of seeds was true and accurate. Defendant has not established that this was a false statement or a statement that the police recklessly used or knew was false.[2]

We believe the trial court did not err in finding there were no false, material statements in the affidavit.

Staleness of the Informant's Information

"Probable cause to search is concerned with whether certain identifiable objects 'are probably to be found at the present time in a certain identifiable place'".[3] It cannot be assumed that evidence of a crime will remain indefinitely in a given place. Thus, staleness is a factor to weigh in determining if there is probable cause to search. Russo, supra,p 605.

The age of the information alone is not determinative, but must be evaluated by the particular circumstances of the case. Id., pp 605-606. The circumstances will vary

depending upon such factors as "whether the crime is a single instance or an ongoing pattern of protracted violations, whether the inherent nature of a scheme suggest that it is probably continuing, and the nature of the property sought, that is, whether it is likely to be promptly disposed of or retained by the person committing the offense." Russo, supra, pp 605-606.

We believe the facts of the present case are sufficient to justify a finding of probable cause despite the lapse of time. The informant told law enforcement officials that eight shipments of both marijuana seeds and equipment used for growing marijuana were sent to defendant at his residence during a period of sixteen months immediately preceding June 28, 1990. The circumstances of the suspected criminal enterprise including the growing of marijuana at defendant's residence, not simply the possession of a specific quantity of drugs, but an ongoing criminal activity. Because it requires time for plants to germinate and grow,

the evidence was not likely to have dissipated despite the passage of time. Russo, supra, pp 605-606.

Lack of Probable Cause

Probable cause to search must exist at the time a warrant is issued. Russo, supra, p 606. Probable cause exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct could be found in a stated place to be searched. Id., pp 606-607.

Rather than engage in hypertechnical after-the-fact scrutiny of affidavits we give great deference to the magistrates' decision because of our preference for the use of search warrants. Russo, supra, pp 603-604. Reading the affidavit in a commonsense and realistic manner, we agree with the trial court that the magistrate properly issued the warrant in this case. The detailed information supplied by the informant, and the verification and corroboration by the police, provided the magistrate with a substantial basis

to find that the was probable cause to search defendant's residence for evidence of marijuana production.

Affirmed.

/s/Michael J. Connor
/s/Harold Hood
/s/Clifford W. Taylor

1. In addition, factual findings made by the trial court in relation to the motion to suppress evidence, are reviewed for clear error. This Court will not reverse those findings unless we are left with a definite and firm conviction that a mistake was made. People v McKendrick, 188 Mich App 128, 468 NW2d 903 (1991), lv den 439 Mich 856 (1991)

2. Defendant has never request production of the unnamed informant for purposes of testing the truthfulness of his statements.

3. Russo, supra, p 605, quoting 2 LaFave, Search and Seizure (2d ed), § 3.7, p 75.

Michigan Supreme Court
Lansing, Michigan

Order

Entered:
July 30, 1993

Michael F. Cavanaugh
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Robert P. Griffin
Conrad L. Mallet, Jr.
Associate Justices

95151(30)

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

SC: 95151
COA: 144151
LC: 90-1934-FH

KARL GLENN STUMPF,

Defendant-Appellant.

On order of the Court, the motion for reconsideration of this Court's order of June 2, 1993 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

Levin, J., would grant the motion for reconsideration, and on reconsideration would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

_____, 1993

/s/
Clerk

STATE OF MICHIGAN
JUDICIAL DISTRICT

AFFIDAVIT FOR SEARCH WARRANT

CASE NO.

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POLICE AGENCY REPORT NUMBER: 24-4680-90

D/SGT. Curtis K. Schram, Affiant(s), state(s) that:

1. The person, place or thing to be searched is described as and is located at:

A single family, two story wooden house, beige in color, with gray shingles located at 18990 Victor, City of Roseville, Macomb County. Further, all vehicles parked in driveway of residence.

2. The PROPERTY to be searched for and seized, if found, is specifically described as:

All substances suspected of being in violation of the Michigan Public Health Code, specifically, but not limited to marijuana. All records, receipts, ledgers, bills, video tapes, and paraphernalia suspected of being connected to the illegal trafficking of controlled substances. All currency and/or negotiable instruments suspected of being connected to the illegal trafficking of controlled substances. All weapons commonly used by drug traffickers to protect their business.

3. The FACTS establishing probable cause or the grounds for search are:

1) Affiant is a Detective/Sergeant with the Michigan State Police currently assigned to the New Baltimore Post and has been a police officer for ten years.

2) On 6/28/90 Hemp Tip number C-01-90 was received stating that a Karl Stumpf had received eight (8) shipments of marijuana seeds and/or equipment used for growing marijuana within the past 16 months at 18990 Victor, Roseville, MI.

3) A check with the utility company of 18990 Victor, shows that a Vivian Stumpf is living at that address. Further, that from 6/9/89 to 7/12/89, 1310 KWH hours of electricity was used. The following month the rate increased to 1537 KWH hours, and the following month increased to 1600 KWH hours.

4) Affiant contacted the residence at 18990 Victor by telephone and a Karl Stumpf identified himself as being at the residence.

5) Affiant, on 9/11/90, observed a 1962 Chevrolet, 2 door, 90?MI. 776-YHN, parked in the driveway. LEIN showed the vehicle was registered to Karl Stumpf.

6) A check of karl Stumpf's arrest record shows that he has been arrested for drugs in the past.

7) A check at 18990 Victor, City of Roseville, was made by Affiant. It was observed that an upstairs window was covered up and had a fan. Further, the basement windows were also covered.

This affidavit consists of 2 pages. /s/ Curtis K. Schram

STATE OF MICHIGAN
JUDICIAL DISTRICT

AFFIDAVIT FOR SEARCH WARRANT

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8) On 8/8/90, Affiant obtained a search warrant using the same information from the informant, and it resulted in a seizure of marijuana and items associated with the growing of marijuana.

9) On 8/21/90, Affiant obtained a search warrant using the same information from the informant, and it resulted in a seizure of marijuana and items associated with the growing of marijuana.

10) On 8/21790, Affiant obtained a search warrant using the same information from the informant, and it resulted in a seizure of marijuana and items associated with the growing of marijuana.

11) It is the belief of the Affiant, based upon ten years police experience and training, that Karl Stumpf is growing marijuana at 18990 Victor, City of Roseville, Macomb County.

Base upon the above facts, Affiant request a search of the home and vehicles.

Affiant further sayeth not.